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Supreme Court of the United States

OCTOBER TERM, 1962

No. 369

JOHN A. PERRICONE and RUTH PERRICONE
Petitioners,

v.

STATE OF NEW JERSEY

Petition for Writ of Certiorari to the Supreme Court of New Jersey

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Petition for Writ of Certiorari to the Supreme Court of New Jersey

---

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue in this case to review the judgment of the Supreme Court of New Jersey affirming the judgment of the Hudson County Juvenile and Domestic Relations Court finding that petitioners were guilty of neglecting their son, John Perricone, by refusing to grant permission for a blood transfusion.

OPINION BELOW

The opinion of the Supreme Court of New Jersey is reported in 37 N.J. 463, 181 A. 2d 751 (June 4, 1962). It is printed, *infra*, pages 17-32, as Appendix A.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on June 4, 1962. See Appendix B, *infra*, pages 32-33. The time for filing this petition ends September 4, 1962. This Court has jurisdiction of this appeal under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Are R.S. 9:2-9, R.S. 9:6-3, R.S. 9:6-4 and R.S. 9:6-11 (Revised Statutes of New Jersey), as construed and applied in this case, contrary to the First and Fourteenth Amendments to the Constitution of the United States because they abridge petitioners' rights of freedom of conscience and freedom of worship contrary to such provisions of the Constitution?

STATUTES INVOLVED

This petition draws into question the validity of certain statutes of the State of New Jersey, which are set forth herewith.

R.S. 9:2-9 (Revised Statutes of New Jersey) provides as follows:

> "9:2-9. Parents or custodian of child unfit; action in Superior Court or Juvenile and Domestic Relations Court
>
> "When the parents of any minor child or the parent or other person having the actual care and custody of any minor child are grossly immoral or unfit to be intrusted with the care and education of such child, or shall neglect to provide the child with proper pro-

tection, maintenance and education, or are of such vicious, careless or dissolute habits as to endanger the welfare of the child or make the child a public charge, or likely to become a public charge; or when the parents of any minor child are dead or cannot be found, and there is no other person, legal guardian or agency exercising custody over such child; it shall be lawful for any person interested in the welfare of such child to institute an action in the Superior Court or the Juvenile and Domestic Relations Court in the county where such minor child is residing, for the purpose of having the child brought before the court, and for further relief provided by this chapter. The court may proceed in the action in a summary manner or otherwise. As amended L. 1948, c. 321, p. 1297, § 7; L. 1949, c. 245, p. 748, § 1; L. 1953, c. 9, p. 72, § 6."

R.S. 9:6-3 provides as follows:

"9:6-3. Cruelty and neglect of children; fine or imprisonment; postponement and probation; commitment of child to society for prevention of cruelty to children; order for payment for support; failure to pay

"Any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of a misdemeanor and, upon conviction thereof, shall be fined not exceeding five hundred dollars ($500.00) or by imprisonment with or without hard labor, as the court may direct, for a term not exceeding three years, or both. If a fine be imposed, the court may direct the same to be paid in whole or in part to the wife, or to the guardian, custodian or trustee of such minor child or children; *provided, however,* that whenever in the

judgment of the court it shall appear to the best interest of the child to place it in the temporary care or custody of a society or corporation, organized or incorporated under the laws of this State, having as one of its objects the prevention of cruelty to children, and the society or corporation is willing to assume such custody and control, the court may postpone sentence and place the child in the custody of such society or corporation, and may place defendant on probation, either with the county probation officers or an officer of the society or corporation to which the child is ordered, and may order the parent, guardian or person having the custody and control of such child to pay to such society or corporation a certain stated sum for the maintenance of such child. When, however, a child is so placed in the custody of such society or corporation, and defendant fails to make the payments as ordered by the court, the court shall cause the arrest and arraignment before it of such defendant, and shall impose upon him the penalty provided in this section. As amended L. 1944, c. 196, p. 711, § 1."

R.S. 9:6-4 provides as follows:

"9:6-4. Jurisdiction of complaints; immediate trial; procedure

"Complaints for violation of the provisions of this chapter may be made to any municipal court, County Court or criminal judicial district court in any county, or juvenile and domestic relations court in every county of this State. Whenever any person, who shall be charged with any such offense upon oath before any court or by indictment, shall, in writing signed by him and addressed to the county prosecutor of the county wherein the offense was committed, waive indictment and trial by jury, or trial by jury, as the case may be, and request to be tried immediately before the County Court or the juvenile and domestic relations court of

such county, without a jury, the county prosecutor shall report such fact to either such court of such county, which, unless it shall deem the public interest will be benefited by denying such request, shall with all due and reasonable speed, proceed to try the person so charged and determine and adjudge his guilt or innocence. As amended L. 1944, c. 196, p. 712, § 2; L. 1953, c. 9, p. 74, § 15."

R.S. 9:6-11 provides as follows:

"9:6-11. Hearing; order of commitment to guardianship of society; powers of society

"The juvenile and domestic relations court, upon notice to the parents and such relatives as are legally liable for the support of such child and to the applicant and other persons interested in the welfare of such child of the hearing, and upon being satisfied that the child should be placed under proper guardianship, may commit such child to the care and custody of any duly authorized or incorporated humane society within this State, having for one of its objects the protection of children from cruelty, and such society shall thereupon have all the rights of a guardian of the person of such child, or make such other or further order as, in the opinion of the court, will be for the best interest of such child. The court may, at any time, modify, revoke or add to its order. As amended L. 1953, c. 9, p. 76, § 19."

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment, relied upon in this case, reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent parts of the Fourteenth Amendment that petitioners rely upon read as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

HOW CONSTITUTIONAL QUESTIONS RAISED AND DETERMINED

In the argument of counsel made in the summary proceedings in the Juvenile and Domestic Relations Court in behalf of petitioners, it was stated as follows:

"* * * Furthermore, the specific reason these parents have given for their objection and refusal to allow blood transfusion is an objection of conscience and of religious conviction. Both the Constitution of this State and of the United States forbids any establishment of religion. A corollary of this Constitutional privilege is that no court may favor or disfavor any religious creed.

* * * I press upon your Honor the proposition that we have here is not a medical issue but an issue of conscience.

* * * In conclusion, may I say that the applicant here makes no proof to warrant the relief it seeks, does so in violation of the highest rights of conscience of the parents and the responsibility for violating

these high rights is one which no court should or may assume for itself." [App. 27a, 28a][1]

The trial court overruled the objections and found a blood transfusion necessary and that the child was a neglected child, authorizing the court to appoint a guardian with power to consent to a blood transfusion. [App. 30a, 31a]

The Supreme Court of New Jersey specifically found that petitioners contended "that their constitutional rights of parental care and religious freedom have been violated." (*Infra*, page 21) The court then stated: "We first consider appellants' argument that the trial court violated the First and Fourteenth Amendments to the Constitution of the United States" by depriving petitioners of freedom of religion and their fundamental rights as parents. (*Infra*, page 22) The Supreme Court of New Jersey concluded that neither the statute "nor the action of the trial court pursuant to the statute is violative of either the Federal or the State Constitution." (*Infra*, page 25)

FACTS

Petitioners appealed from an order of the Hudson County Juvenile and Domestic Relations Court finding them guilty of neglecting their child, John, "in refusing to grant permission for blood transfusions" and ordering Thomas J. Finn, Superintendent of the B. S. Pollak Hospital for Chest Diseases of Jersey City, appointed guardian of the infant child and authorizing him to consent to blood transfusions. [App. 1a, 2a] The complaint made to the trial court below instituting these proceedings under R.S. 9:6-4, N. J. S. A., was oral because formal pleadings and notice were waived. [App. 6a] The complaint sought the order above described for the custody and treatment of the three

[1] Numbers appearing herein within brackets preceded by "App." refer to pages of the Appendix to Brief for Appellants filed in the Supreme Court of New Jersey.

and one-half year old infant confined to the hospital from March 1, 1961, to March 3, 1961, the date of the hearing. [App. 6a]

Petitioners objected to the proceedings on the grounds that the court had no jurisdiction under R.S. 9:2-9, N. J. S. A., because they were not grossly immoral or unfit parents. [App. 6a] The objection was overruled and the proceedings continued to conclusion. [App. 7a] The order was rendered by the court below on June 23, 1961, formally in writing after the finding of March 23, 1961. [App. 2a] The temporary guardian authorized the blood transfusions that were given, and the child subsequently died. [App. 2a]

Respondent supported its case by the testimony of Dr. Martin Frank and Dr. Gilbert E. Levinson. [App. 7a-22a] The petitioners supported their case by their own testimony and offered no expert evidence. [App. 22a-26a]

The evidence showed that the child, upon admission to the hospital, was suffering as a "blue child." He was blue around the lips and the nails on his hands and feet, which was caused by chronic lack of oxygen. [App. 10a] The child also was suffering from a heart difficulty and there was a reduced flow of blood through the lungs. [App. 10a] The clinical diagnosis was that he had an abnormal communication "between the right and left side of the major chambers" of the heart and a narrowing of the outflow tract on the right side of the heart, creating resistance to the flow of blood from the right to the left, causing the blueness. [App. 10a]

The treatment prescribed for this was that the infant "receive a blood transfusion which will not entirely correct this problem, but will alleviate it." The blood transfusion would supply red cells carrying oxygen, for which there is no medical substitute. [App. 11a] The chances of survival by the child could be improved by the blood transfusion. [App. 12a]

The testimony showed that the child was in danger of death. [App. 12a] Other treatments of the condition were

attempted with no improvement, and the doctors said that none of them "are as effective as the blood itself would be." [App. 12a]

During the course of the examination of the child for purposes of diagnosis a catheter was placed in the veins of the child, causing a loss of about three ounces of blood from his system. [App. 13a, 14a] The system of the child was unable, through normal means, to produce the needed quantity of blood lost in order to prevent impairment and a collapse. [App. 17a] Doctors testified that the chance of the child for survival "would be very much improved if transfusion was given"; and that there would be a reversal of the pressure on the brain and the involvement of the central nervous system. [App. 17a, 18a]

During the night of the hearing the child continued in a coma with a paralysis of limbs and a labored respiration and continued blueness despite the "administration of oxygen by special tent" and other procedures. [App. 19a] His condition was worsening at the time of the hearing. [App. 19a] It was said that the only way to give the child normal oxygen in the system would be by blood transfusion. [App. 20a]

The petitioners are Jehovah's Witnesses and believe in the teachings and doctrines of that faith. [App. 22a] They have deeply-held religious objections to blood transfusion based upon their belief in the commandments of Almighty God appearing in the Holy Bible at Leviticus 17:11-12. [App. 23a] John A. Perricone stated that such scripture provides: "the life of the flesh is in the blood. No soul of you shall eat blood; neither shall any stranger that so joineth meeting you eat blood. From the viewpoint of this scripture and others that point to this, I can assume then, from my position as a dedicated minister of Jehovah's Witnesses, to hold fast to the belief or to the teachings which were set down in the Bible." [App. 23a]

The petitioners consented in writing to the performance of surgical operation upon the child and other medical pro-

cedures except blood transfusion, to which they objected. [App. 24a] The objection was noted in the hospital record on the consent document and witnessed. [App. 25a]

At the close of all the evidence an oral motion for the entry of an order dismissing the proceedings was made, in which reasons were enumerated supporting the questions presented upon this petition. [App. 26a-28a]

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari in this case because a substantial federal constitutional question of great public importance is involved. There are upward of 300,000 of Jehovah's Witnesses in the United States whose children receive medical care. There are thousands of these cases where the issue of their religious objections to blood transfusion arises. These cases have been given nationwide publicity in the public press and over the radio and television stations of the nation. It has become so important that it has forced the governing body of Jehovah's Witnesses to publish in defense of the Biblical stand of Jehovah's Witnesses the publication entitled "Blood, Medicine and the Law of God" (Brooklyn, N. Y., Watchtower Bible and Tract Society of New York, Inc., 1961). This *question is not* one that will die down. It continues to abide with the judges of juvenile courts and higher state courts throughout the land.

Because of the emergency that is usually attendant to hospital treatment of a minor and the speed with which the doctors and officials invoke the power of the state under the doctrine of *parens patriae* Jehovah's Witnesses during the last ten years have been able to bring before the higher courts of the states only four cases out of the great multitude of summary trial court litigation throughout the nation.—*People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, 104 N. E. 2d 769 (1952), cert. denied 344 U. S. 824 (1952); *Morrison* v. *State of Missouri*, 252 S. W. 2d 27 (Kansas City

Ct. of App. 1952); *State of New Jersey* v. *Perricone*, 37 N. J. 463, 181 A. 2d 751 (June 4, 1962); *Matter of Santos*, 16 App. Div. 2d 755 (1st Dept., May 3, 1962), pending on motion for leave to appeal to the New York Court of Appeals.

The court below relied on *Prince* v. *Massachusetts*, 321 U. S. 158 (1944). That case, it is submitted, does not control the question involved in this case.

In *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), the child labor law of Massachusetts was interpreted by the state courts to prohibit children of Jehovah's Witnesses from engaging in public worship with the parents on the streets by distribution of magazines. This Court held that the police powers of the state under the doctrine of *parens patriae* outweighed the constitutional rights of the parents and children. There was involved in that case a state policy enacted for the welfare of all the children in the state. That is not the case here. The considerations supporting the *Prince* holding were so weighty that the constitutional guarantees were insufficient to tip the scales of justice.

The situation presented here is entirely different from the facts in the *Prince* case. In that case there was a prohibition against the parent imposed by the state. This restriction by the state did not itself involve subjecting the child to dangers. Here the state imposes and forces an act that exposes the child to danger.

Prince v. *Massachusetts*, 321 U. S. 158 (1944), involved a narrowly drawn statute. It did not involve a vague and indefinite policy expressed in a statute like that involved here. The law here does not present a uniform and specific policy. The statute challenged here is not narrowly drawn, which is required by the Court in cases arising under the First Amendment. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), at pages 307, 308. It, by vague and indefinite provisions, permits the state policy and the enforcement thereof to be vested in a judge and a doctor, who have unlimited authority to deal with the liberty and person of the citizen

without statutory limitation. If a judge is told by a doctor that the failure to give any particular medical treatment recommended by the doctor is not "proper parental care" and the judge chooses to do so, he can invade the person and liberty of the child and the parent. Without some definitely ascertainable standard by which the judge and the interested parties can proceed, know and determine their respective rights under the Constitution and the police power, there is a violation of the liberties guaranteed by the First and Fourteenth Amendments.

The lack of the required narrowly-drawn law makes the statute, as enforced, construed and applied here, invalid under the First and Fourteenth Amendments. *Winters* v. *New York*, 333 U. S. 507, at pages 515-518 (1948); *Lanzetta* v. *New Jersey*, 306 U. S. 451, at pages 457-458 (1939); *Herndon* v. *Lowry*, 301 U. S. 242, at page 258 (1937), The statute, as construed and applied, seems clearly to be invalid under these decisions.

The court below by its decision sweeps out the back door a uniform common law policy—not changed by the legislature of New Jersey established by the judges when the mind of man runs not to the contrary. This policy is that it is for the parents and not for the court to decide whether a major operation upon a child shall or shall not be performed. See In re *Hudson*, 13 Wash. 2d 673, 126 P. 2d 765 (1942); In re *Tuttendario*, 21 Pa. Dist. 561 (Q. S. Phila. Co. 1911). This common law policy is preserved as a part of the rights guaranteed by the First and Fourteenth Amendments. Known from time immemorial, this common law policy cannot be extirpated from the Constitution by a vague and indefinite statute loosely construed by the state courts. The respondent has failed to meet the standards required by the Court in decisions arising under the First and Fourteenth Amendments. *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88, 96

(1940). See also *Busey* v. *District of Columbia*, 138 F. 2d 592, 595-596 (D. C. Cir. 1943).

Unfortunately the petitioners did not have a chance to muster any medical defense. The proceedings were summary and rammed through in order to obtain speedily the legal consent required by the doctors. No time to prepare was given. The petitioners were rushed from the hospital to the courthouse and therefore did not have time to get doctors of their own choice to give testimony on the question of propriety of blood transfusion. They had barely time to get a lawyer to appear for them.

In *Meyer* v. *Nebraska*, 262 U. S. 390, 401-402 (1923), it was declared that the liberty secured by the federal compact was not merely freedom from bodily restraint; but that there was secured the right to engage in the common occupations of life, to marry, establish a home and bring up children. It was said that the citizen is protected in the enjoyment of those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen. *Berea College* v. *Kentucky*, 211 U. S. 45, 47 (1908); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897). Marriage and childbearing is Almighty God's arrangement for all humankind that live and shall live on earth. The state is powerless to interfere with or abridge the right of all persons within its boundary to procreate. Even this right cannot be denied to criminals. *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). By stronger force of reason the State here cannot interfere with and abridge the parents' right to choose medical treatment for their child in a way acceptable to their own judgment so long as it is not inimical to the well-defined interest of the state.—*Pierce* v. *Society of Sisters*, 268 U. S. 510, 534 (1925).

The cases concerning failure to furnish any medical attention to an ill child, employment of child in hazardous industries or in jobs which are clearly shown to be dangerous and imperil the life, limb and health of the child do not apply to or control a situation of the kind involved here.

Those cases deal with the *abuse*, of plainly reveal a clear and present danger of some injury which may be prevented by the state. It is unnecessary to discuss the many cases of this kind to be found in every state, because they are not in point.

The specious argument advocating the adoption of Spartan totalitarian principles by the premature and unjustified excercise of *parens patriae* over the child is rejected in *Meyer* v. *Nebraska*, 262 U. S. 390, *supra*, at pages 401-402, (1923).

The advent of the blood transfusion and the use of the transfusion to treat disease have presented questions in medical science that will be impossible to settle. The use of blood transfusions is only partially explored, though the use of them has gained acceptance in many fields. There is great uncertainty and danger in the use of transfusions in the treatment of disease.—See 3 Can. Bar Journal 365 (Oct. 1960), "Religion, Medicine and Law"; 1 Medicolegal Digest, pages 21-23 (June 1960); 6 Lippincott's Medical Science, pages 99-114 (July 25, 1959); and 180 Journal of the American Medical Association 1079-1085 (June 30, 1962), "Serum Hepatitis from Transfusions of Blood."

The scriptures relied upon by the parents in the court below show a genuine good faith belief within the ambit of freedom of religion guarantees in the constitutions that is founded solidly on the Bible. They show that the life is in the blood and that therefore blood may not be taken. "If anyone at all belonging to the house of Israel or the proselytes who reside among them eats any blood at all, against the person who eats blood I will set my face, and will cut him off from his people; . . . for the life of every creature is identical with its blood."—See Leviticus 17: 10-14, *An American Translation.*

The prohibition of blood for food was stated to the representatives of the whole human race, to the survivors of the Noachian flood, long before the law was given to Moses. "But flesh with the life thereof, which is the blood

thereof, shall ye not eat. And surely your blood, the blood of your lives, will I require; at the hand of every beast will I require it: and at the hand of man, even at the hand of every man's brother, will I require the life of man." —Genesis 9:4, 5, *American Standard Version.*

That this ban applies to the human race right on up through the days of Jesus to this date is made very clear by the record in the book of Acts, concerning the commands that were given to the early church. This prohibition of blood was stated not only once but three times: "For it seemed good to the holy spirit, and to us, to lay upon you no greater burden than these necessary things; that ye abstain from things sacrificed to idols, and from blood, and from things strangled, and from fornication; from which if ye keep yourselves, it shall be well with you." —Acts 15:28, 29, *American Standard Version;* see also Acts 15:20; 21:25.

In defense of the modern practice of blood transfusion the respondent probably will argue that receiving blood in that way is not the same as eating it because it does not enter the mouth, etc. However, the fact that blood is used in another manner does not at all justify its use. Doubtless had transfusion of blood been practiced in Moses' day or at the time of the Flood or in the days of the apostles, it would have been specifically banned. Feeding the blood into the vein is every bit as much intravenous feeding as is the giving of water mixed with dextrose. The fact that it does not enter the digestive system is beside the point. It is basically the transfer of the life stream from one to another that is banned by Jehovah in His Word. The parents of the child believe that to obey God's law by refusing to touch blood is better than to sacrifice it by means of blood transfusion.—1 Samuel 15:22.

It may be argued that the belief that blood transfusions are prohibited by the Bible is unreasonable. But that contention has never been sustained. It is not within the competency of the courts to say what is or what is not reason-

able in reference to religious beliefs. See *Reynolds* v. *United States*, 98 U. S. 145 (1878). In the course of dictum the Court quoted from the Virginia Statute for Religious Freedom, as follows: "'that to suffer the civil magistrate to intrude his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty'."

CONCLUSION

This Court is respectfully requested to hold that there is involved in this case an important and substantial question of constitutional law, national in scope, which has not been determined by this Court but which should be decided by it and, as the results thereof, grant this petition for writ of certiorari.

Respectfully submitted,

HAYDEN C. COVINGTON

THEODORE SAGER METH

Counsel for Petitioners

August, 1962.

APPENDIX A

SUPREME COURT OF NEW JERSEY

A-104 September 1961 Term

STATE OF NEW JERSEY
(Thomas J. Finn, Superintendent of B. S. Pollak Hospital for Chest Diseases, Complaining Witness),
Plaintiff-Respondent,
vs.
JOHN A. PERRICONE and RUTH PERRICONE, Parents of John Perricone, an Infant,
Defendants-Appellants.

Argued April 3, 1962. Decided June 4, 1962

Mr. Hayden C. Covington of the New York Bar argued the cause for appellants; *Mr. Robert M. Wood*, of counsel, appearing; *Messrs. Meth, Bloom & Wood*, attorneys.

Mr. James H. Dowden, Assistant County Counsel of Hudson County, argued the cause for respondent; *Mr. William F. Kelly, Jr.*, County Counsel, attorney.

The opinion of the Court was delivered by
SCHETTINO, J.

The Perricones, who are Jehovah's Witnesses, appeal from an order (a) finding them guilty of neglect of their infant son, John, in refusing to grant permission for necessary blood transfusions; (b) appointing Thomas J. Finn, Superintendent of the Berthold S. Pollak Hospital for Chest Diseases, Jersey City, as guardian of the infant and authorizing Mr. Finn to execute the necessary consent for a blood transfusion; and (c) awarding custody and care of the infant to Mr. Finn until further order of the court. While

the appeal was pending in the Appellate Division, we certified the matter on our own motion.

The facts are not in dispute. Appellants were the parents of the infant, John Perricone, who was admitted to the Pollak Hospital on March 1, 1961. At that time John was described as "a blue child [,] * * * blue around the lips and on the nail beds, both on fingers and toes, and who showed clubbing of the fingers and the toes, which is evidence of chronic oxygen lack * * *. On further physical examination it was noted that his heart was enlarged primarily on the right side, that the heart rhythm was regular; that the second sound, the left upper chest, which is usually re-duplicated, was single in nature and at this location there was a moderately loud murmur that occured during the contraction of the heart."

When the infant was admitted, Mrs. Perricone consented to the performance of such surgical operations as the physicians of the hospital thought necessary for the boy's welfare. Although this consent had no restrictions, the infant's "Progress Record" contained the notation: "Parents are Jehovah Witnesses—request no usage of blood transfusions." The physicians sought to treat John without the use of blood transfusions until they thought such transfusions were essential. At that point they requested permission from the Perricones to administer blood. When permission was denied, Mr. Finn applied through County Counsel to the Assignment Judge of Hudson County "to have a special guardian appointed for this child for the express and sole purpose of having the necessary medical attention given to the child in the form of blood transfusions, which the physicians believe to be necessary." Respondent was afraid that another court would not have jurisdiction over appellants as they resided in Union County while the hospital was in Hudson County. The Assignment Judge referred the cause for trial to Judge Morris Barison of the Juvenile and Domestic Relations Court of Hudson County. The complaint was oral; formal pleadings

and notice were waived. The trial started on March 3, 1961, at 8:30 p.m. and ended at 11:30 p.m. Appellants were there represented by counsel who moved to dismiss the proceedings on the ground the court lacked jurisdiction under *R. S.* 9:2-9 but the objection was overruled.

Dr. Martin Frank, one of the two physicians who had attended the child, testified that the infant was in danger of death, that John was "critically ill" and that "the most likely clinical diagnosis involved an abnormal communication between the right and the left side of the major chambers or ventricles of the heart [a condition] associated with a narrowing of the out-flow tract of the right heart which created enough resistance to force the blood to flow from right to left and was responsible for the blueness." According to Dr. Frank, the hospital had attempted procedures other than blood transfusions to treat the child "but none of these [is] as effective as the blood itself would be."

The child's condition grew steadily worse during the 36 hours following his admission to the hospital. Dr. Frank stated that: "at the present time this child suffers from oxygen lack, which is a chronic problem and is a result of the reduction of the quantity of blood flowing through his lungs. The treatment which is recommended is that he receive a blood transfusion which will not entirely correct this problem, but will alleviate it * * *. The purpose is to supply red cells which carry oxygen which have a special function and for which, at the present time, there is no known medical substitute." In response to the question of whether the danger of death could be averted to a degree by the use of a blood transfusion, he said, "I think his chances will be improved for survival." It was his opinion also that: "[A]dequate supply of oxygen to the brain, given in time and frequently, assisted by the use of blood transfusions, may prevent severe irreversible damage to the brain and be life-saving." Furthermore, he pointed out that the child had lost 3-1/2 ounces of blood as a result of a catheter used for

diagnostic studies when the patient was admitted. The volume of the loss seemed less critical, in the doctor's opinion, than the patient's response to the loss. The latter led Dr. Frank to conclude that the patient's oxygen carrying capacity was poor, and that a blood transfusion was necessary. On cross-examination, Dr. Frank testified the child's chances of dying that very night would be "two or three times greater" if he did not have a blood transfusion.

Dr. Gilbert E. Levinson, the only other doctor who had examined the child, corroborated Dr. Frank's testimony. Transfusions, he asserted, would free the child of possible neurological disability also. On cross-examination he said: "I think without transfusion he has only an outside chance for surviving," and even if under the circumstances the child did not die, his mentality would be impaired.

Appellants produced no medical witness. The father testified that he is a member of Jehovah's Witnesses and that his sole reason for refusing to permit a blood transfusion was based upon passages in their Bible, *New World Translation of the Holy Scriptures* (1961 ed.). He stated:

> "I have dedicated my life to do God's work in accordance with scriptures of the Bible. One of the particular scriptures makes mention of taking of blood or transferring it from one person to another. The one part I have in mind is taken from the book Leviticus, 17th Chapter, Verse 11-12. It states the life of the flesh is in the blood. No soul of you shall eat blood; neither shall any stranger that so joineth meeting you eat blood. From the view point of this scripture and others that point to this, I can assume then, from my position as a dedicated minister of Jehovah's Witnesses, to hold fast to the belief or to the teachings which were set down in the Bible."

Although he knew his son might die without the transfusion, he had not sought advice from other doctors regarding the

advisability of a transfusion. And the mother was in full accord with her husband's decisions.

On the basis of these facts the order sought was issued. Yet in spite of the blood transfusions finally administered, the child died.

Both sides urge us not to dismiss the case as moot because of the death of the infant. They strongly emphasize the public importance of a decision which would settle the question so that parents, physicians and hospitals will have proper legal guidance. With this we concur. The public interest requires us to decide the cause. See cases collected in 132 *A.L.R.* 1185 (1941).

On this appeal the Perricones argue that their constitutional rights of parental care and religious freedom have been violated, that the court was without jurisdiction to take custody of the child from them under *R. S.* 9:6-3, 4 and 11, because appellants were not unfit parents, nor "cruel" nor "neglectful" as these terms are there used; and that *R. S.* 9:6-1.1, providing that parents shall not be denied the right to treat or provide treatment for an ill child "in accordance with the religious tenets of any church," was violated by the court order. They contend also that it is not within the competency of courts to say what is or what is not reasonable in reference to religious beliefs. And on summation and at oral argument they advanced the argument that the use of blood transfusions in the treatment of disease is still of doubtful if not of harmful value. Any doubts, they say, should be resolved in favor of the parents' judgment.

Respondent urges that as this case involved a neglected infant the common law doctrine of "parens patriae" exercised historically by the Chancery Court applies. Respondent also claims that this doctrine has been recognized by the Legislature in *R. S.* 9:2-9 *et seq.*, which provides that the Superior Court or the Juvenile and Domestic Relations Court may order that custody be taken from parents when the parents are unfit or neglect to provide proper protec-

tion, maintenance and education. Moreover, it urges the view that *R. S.* 9:6-1.1 is restricted in application to cases where parents are subjected to criminal prosecution for neglect. On the constitutional religious issue, respondent argues the right to religious freedom must give way when that which the State is charged with protecting, e.g., in this case, a child, is placed in "immediate and present danger."

I

We first consider appellants' argument that the trial court violated the First and Fourteenth Amendments to the Constitution of the United States and Article I, par. 3, of our State Constitution, by depriving them of freedom of religion and their rights as parents.

Appellants contend that the Scriptures show their good faith and belief in the religious doctrine that life is in the blood; therefore, the blood may not be eaten. The Scriptures, as published in their Bible, state:

"As for any man of the house of Israel or some alien resident who is residing as an alien in YOUR midst who eats any sort of blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people."—Leviticus 17:10.

"For the soul of every sort of flesh is its blood by the soul in it. Consequently I said to the sons of Israel: 'You must not eat the blood of any sort of flesh, because the soul of every sort of flesh is its blood. Anyone eating it will be cut off.'"—Leviticus 17:14.

Appellants point out that the proscription of the use of blood as food was declared to the human survivors of the Noachian flood, long before the law was given to Moses. In their Bible they note Genesis 9: "[4] Only flesh with its soul—its blood—YOU must not eat. [5] And, besides that, YOUR blood of YOUR souls shall I ask back. From the hand of every living creature shall I ask it back; and from the hand of man, from the hand of each one who is his brother, shall I ask back the soul of man."

They state that still a third time was the ban against eating blood proclaimed in the Book of Acts, 15: "28 For the holy spirit and we ourselves have favored adding no further burden to you, except these necessary things, 29 to keep yourselves free from things sacrificed to idols and from blood and from things strangled and from fornication. If you carefully keep yourselves from these things, you will prosper. Good health to you!"

It is conceded that appellants' interpretation of these references is in accord with the tenets of their religion and that appellants at all times acted sincerely with the best interests of their child in mind.

In *David v. Beason*, 133 *U. S.* 333, 342, 33 *L. Ed.* 637, 640 (1890), the Supreme Court stated that The First Amendment "was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, led to the adoption of [this Amendment]." And in *Cantwell v. Connecticut*, 310 *U. S.* 296, 303-04, 84 L. Ed. 1213, 1218 (1940), the Supreme Court set forth the dimensions of the free exercise of religion stating: "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization

or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."

Concededly, freedom of religion and the right of parents to the care and training of their children are to be accorded the highest possible respect in our basic scheme. *West Virginia State Bd. of Ed. v. Barnette*, 319 *U.S.* 624, 87 *L. Ed.* 1628 (1943); *Pierce v. Society of Sisters*, 268 *U.S.* 510, 69 *L. Ed.* 1070 (1925); *Daly v. Daly*, 21 *N.J.* 599, 604 (1956). But "neither rights of religion nor rights of parenthood are beyond limitation." *Prince v. Massachusetts*, 321 *U.S.* 158, 166, 88 *L. Ed.* 645, 652 (1944); *Sadlock v. Bd. of Ed. of Carlstadt*, 137 *N.J.L.* 85, 91 (*Sup. Ct.* 1948). See also *McBride v. McCorkle*, 44 *N.J. Super.* 468 (*App. Div.* 1957) where the court pointed out that while freedom to believe is absolute, freedom to exercise one's belief is not and must be considered in light of the general public welfare. The opinion noted that although attendance at Mass on Sundays and Holy Days as prescribed by the Roman Catholic Church is the "exercise" of religion, a prisoner who, in common with 30 other men in the segregation wing of the State Prison, was prevented from attending Mass on Sundays and Holy Days as prescribed by the Roman Catholic Church, was not thereby subjected to cruel and unusual punishment or deprived of his constitutional right of free exercise of his religion. In *Reynolds v. United States*, 98 *U.S.* 145, 88 *L. Ed.* 645 (1879), the Supreme Court upheld a Morman's conviction for bigamy against the defense of interference with religious freedom as guaranteed in the First Amendment. Chief Justice Waite there stated: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously con-

tended that the civil government under which he lived could not interfere to prevent a sacrifice?" 98 *U.S.* at 166, 25 *L. Ed.* at 250.

In *Prince* the Court held that Massachusetts, acting to safeguard the general interest and well-being of its youth, could prohibit a child of a Jehovah's Witness parent from distributing religious pamphlets on the street even though the child was accompanied by her adult guardian. The court observed: "The right to practice religion freely does not include liberty to expose * * * the child * * * to ill health or death." 321 *U.S.* at pages 166-67, 88 *L. Ed.* at 653. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." 321 *U.S.* 170, 88 *L. Ed.* 654. Thus, where the interests of society as a whole necessitate a certain course of action, they have been held paramount to certain personal freedoms.

The facts in the instant case clearly evidence a more compelling necessity for the protection of a child's welfare than those in *Prince*. And the arguments presented in the above cases are of equal force and effect with respect to Article I, par. 3, of the New Jersey Constitution. We hold, therefore, that neither *R.S.* 9:2-9 nor the action of the trial court pursuant to the statute is violative of either the Federal or the State Constitution.

II

Appellants would have us declare that the trial court lacked jurisdiction under *R.S.* 9:6-3, 9:6-4 and 9:6-11 to take temporary custody from the parents of the child and order a blood transfusion because the parents were not guilty of cruelty and neglect of the child by refusing the blood transfusion. They argue that *R.S.* 9:6-1 defines an abused or neglected child, that the Legislature did not provide that failure to submit the child to medical care recom-

mended by a competent doctor or group of doctors was not proper parental care, that the trial court legislated by judicial fiat and, as the power to legislate does not lie in the hands of a judge but in the Legislature, the order of the court must fall unless it finds authority in the common law of the State of New Jersey.

According to appellants "the common law left the choice and wisdom of particular medical treatment to the discretion of the natural parent," citing as authority *In re Vasko*, 238 *App. Div.* 128, 263 *N.Y.S.* 552 (*2d Dept.* 1933), and *In re Rotkowitz*, 175 *Misc.* 948, 25 *N.Y.S. 2d* 624, 625 (*Dom. Rel. Ct., Kings Co.*, 1941), wherein is stated: "It is doubtful that under the common law, the courts had the powers now conferred upon them, to order treatment for children to the extent even of a surgical operation or to require of parents to do that which is promotive of the interests and is protective of the rights of a child." They conclude that the exercise of the right of selection between alternatives, a choice of a new therapy or refusal of it by the parents, may not be reviewed by the court because there is no statutory authority, that their conduct does not constitute "neglect" as that term is used in the statute and that *the exercise of judgment or choice in performing the discretionary power conferred by the common law on the parents* does not constitute "neglect" under the statute. Because it is not entirely clear from appellants' argument whether they would concede common law jurisdiction in the courts to take custody from parents when considerations other than religious beliefs are involved, we assume they do not.

Historically, the jurisdiction here exercised by the trial court was in its character *parens patriae*, *i.e.*, a sovereign right and duty to care for a child and protect him from neglect, abuse and fraud during his minority. *Lippincott v. Lippincott*, 97 *N.J. Eq.* 517, 519-20 (*E. & A.* 1925); *cf. Johnson v. State*, 18 *N.J.* 422, 430 (1955). Parents were under a similar duty to provide reasonable care, protection,

maintenance and education for their children. While, absent a statutory provision, a parent could not be convicted of a crime for refusing on religious grounds to provide certain medical aid for his child (*Regina v. Wagstaffe*, 10 *Cox C.C.* 530, 32 *J.P.* 215 (1868); *cf. State v. Watson*, 77 *N.J.L.* 299, 300 (*Sup. Ct.* 1909)), the common law courts could act to protect the interests of the child, take custody from the parents and appoint a guardian when the parents had failed in their duty or were unfit to be intrusted with the care of the child. *Duke of Beaufort v. Berty*, 1 *P. Wms.* 703, 24 *Eng. Rep.* 579, 580 (Ch. 1721); *Wellesley v. Beaufort*, 2 *Russ.* 1, 38 *Eng. Rep.* 236, 244 (*Ch.* 1827), *affirmed sub nom. Wellesley v. Wellesley*, 1 *Dow. & Cl.* 152, 6 *Eng. Rep.* 481 (1829). See also Tyler, *Law of Infancy* 243 (1868); 2 Story, *Equity Jurisprudence* § 1341, p. 676 (1886); Woerner, *American Law of Guardianship*, pp. 20, 159 (1897); 4 Pomeroy, *Equity Jurisprudence*, § 1307, p. 875 (5th ed. 1941).

The principles regarding the State's interest in infants were specifically written into the statute establishing the jurisdiction of the Juvenile and Domestic Relations Court. L. 1929, c. 157, § 1, p. 274. The present provision, *N.J.S.* 2A:4-2, is worded substantially the same:

> "It is hereby declared to be a principle governing the law of this state that children under the jurisdiction of said court are wards of the state, subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them."

Ordinarily children are brought within the jurisdiction of a court when proceedings are instituted affecting the person of the infant. 43 *C.J.S., Infants* § 5, pp. 51-2 (1945); 31 *C.J., Infants* § 9, p. 990 (1923); 27 *Am. Jur., Infants* § 101, p. 823 (1940). *Cf. In re Cox's Guardianship*, 12 *N.J. Misc.* 536, 539 (*Prerog. Ct.* 1934); Tiffany, *Domestic Relations*, § 193, p. 461 (3rd ed. 1921); 1 Schouler, *Marriage*,

Divorce, Separation and Domestic Relations §§ 743, 794 (6th ed. 1921).

The statute applicable to this matter, *R.S.* 9:2-9, reads:

> "When the parents of any minor child or the parent or other person having actual care and custody of any minor child are grossly immoral or *unfit to be intrusted with the care and education of such child, or shall neglect to provide the child with proper protection, maintenance and education,* * * *; it shall be lawful for any person interested in the welfare of such child to institute an action in the Superior Court or the Juvenile and Domestic Relations Court in the county where such minor child is residing, for the purpose of having the child brought before the court, and for further relief provided by this chapter. The court may proceed in the action in a summary manner or otherwise." (Emphasis added.)

And *R.S.* 9:2-10 provides for an order of custody.

We are of the opinion that *R.S.* 9:2-9 and *R.S.* 9:2-10 authorize the action taken by the trial court here. In *Hoener v. Bertinato*, 67 *N.J. Super.* 517, 521 (*Juv. and Dom. Rel. Ct.* 1961), the court held that parents who refused to consent to administering blood transfusions if their baby was born as expected with RH negative blood were neglecting to provide the child with proper protection within the meaning of *R.S.* 9:2-9. That portion of the statute appears to be sufficiently broad to cover the instant facts as well. With regard to whether or not a parent is "unfit" to be intrusted with the care of his child, compare *Wellesley v. Beaufort, supra.*

Respondent concedes that appellants evidenced sincere parental concern and affection for their child. But that is not the controlling factor. Thus, courts have held that the refusal of parents, on religious grounds, to submit their infant child to a blood transfusion necessary to save its life or mental health amounted to statutory neglect, and therefore it was proper to appoint a guardian and to award

custody to him for the limited purpose of authorizing transfusions. *People ex. rel. Wallace v. Labrenz*, 411 *Ill.* 618, 104 *N.E.* 2*d* 769 (1952), *cert. den.* 344 *U.S.* 824, 97 *L. Ed.* 642 (1952); *Morrison v. State*, 252 *S.W.* 2*d* 97 (*Kan. City, Mo. Ct. of App.* 1952). See also Cawley, *Criminal Liability in Faith Healing*, 39 *Minn. L. Rev.* 48, 57-64 (1954); *Mitchell v. Davis*, 205 *S.W.* 2*d* 812 (*Tex. Civ. App.* 1947); *Heinemann's Appeal*, 96 *Pa.* 112, 42 *Am. Rep.* 532 (1880). Concededly "neglect" and "neglect to provide • • • proper protection" are not precisely parallel. But both statutory provisions have the welfare of infants as their prime purpose. Moreover, the Legislature has provided that the jurisdiction of the Juvenile and Domestic Relations Court shall extend to protect infants from neglect and to enforce legal obligations due them. *N.J.S.* 2*A*: 4-2. We think that no less was intended by the provisions of *R.S.* 9: 2-9 and *R.S.* 9: 2-10.

In appellants' view, *R.S.* 9: 6-1. 1 precludes the conclusion we have just reached. That argument is answered by reference to *R.S.* 9: 6-1. 1 itself:

> *"The article to which this act is a supplement* shall not be construed to deny the right of a parent, guardian or person having the care, custody and control of any child to treat or provide treatment for an ill child in accordance with the religious tenets of any church *as authorized by other statutes of this State;* • • •." (Emphasis added.)

The "article" referred to is Article I of Chapter 6, a portion of the Protective Welfare Laws prescribing *criminal* penalties for violation. See *R.S.* 9: 6-3. In view of the fact that the supplement was part of a statute providing for criminal sanctions, the only reasonable interpretation is that the Legislature intended to protect from criminal prosecution persons acting pursuant to their religious beliefs where the welfare of children is involved. But it does not follow that because such persons are immune from criminal prosecu-

tions, the State is helpless in protecting children. *Hodner, supra*, 67 *N.J. Super.* at 523.

III

Even accepting the foregoing, appellants contend that as blood transfusions are not universally recognized as beneficial or safe, the trial court was in error in authorizing the guardian to permit the treatment. We cannot agree with appellants. True, not every refusal to consent to treatment for an infant constitutes evidence of unfitness or neglect to provide proper protection. For example, refusals to permit corrective surgery for a congenital arm deformity (*In re Hudson*, 13 *Wash. 2d* 673, 126 *P.2d* 765 (1942)) and to correct rachitis (*In re Tuttendario*, 21 *Pa. Dist.* 561 (*Q.S. Phila. Co.* 1911)) have been held insufficient grounds for taking custody from the parents. Although the court in *Hudson* reasoned that refusal to consent to a surgical operation would not of itself indicate that the parents were unfit, the facts in that case are distinguishable from the case at hand. The infant's life was not considered in imminent danger and the proposed operation constituted a significant element of danger in itself. The court in *Tuttendario* held that the parents' fear about the danger of the operation was not so unjustified to warrant court intervention in view of the fact that several previous infants of those parents had died, a possible indication of inherent weak resistance to disease or traumatic experience common to every child of those parents.

A result similar to that in *Hudson* and *Tuttendario* was reached in *In re Seiferth*, 309 *N.Y.* 80, 127 *N.E. 2d* 820, 823 (1955). In affirming the trial court's refusal to order a corrective operation for an infant's cleft palate, the Court of Appeals weighed the conflicting considerations and recognized the discretion of the trial court. As there was not a preponderance of proof either that the operation would be more helpful if performed immediately or that the child's overall condition would be bettered under the circumstances,

the court refused to overrule the parent's wishes. But none of these factors appears in the instant case and in this respect each situation must be dealt with in view of the nature of the operation or treatment and the parent's refusal to permit it. *Cf. Oakey v. Jackson*, [1914] 1 *K.B.* 216, 220.

Concededly, medicine and surgery are not yet exact sciences and the result of any given operation or treatment cannot be foretold with complete accuracy. However, courts can be guided only by the prevailing medical opinion. Had there been a relevant and substantial difference of medical opinion about the efficacy of the proposed treatment or if there were substantial evidence that the treatment itself posed a significant danger to the infant's life, a strong argument could be made in favor of appellants' position. No such evidence was here presented. The medical testimony was unanimous in its endorsement of the necessity for immediate blood transfusions.

IV

The question arose at oral argument as to why the trial court felt it necessary to appoint a special guardian for the limited purpose of ordering a blood transfusion rather than directly ordering a transfusion. Probably the trial court was motivated by considerations suggested in *Labrenz, supra*. There, the chief probation officer of the trial court was appointed and directed to consent to the transfusions. The court retained jurisdiction in case further orders were found necessary. On May 4, 1951, the guardian reported to the court that a transfusion had been administered on April 18, 1951, and that the child's health had greatly improved. The court then ordered the child released from the hospital and returned to her parents. However, it refused to discharge the guardian at that time because it felt that periodic medical examinations might be necessary to determine the need for additional transfusions (and if so the guardian

could order them without instituting another suit). We think the court here acted properly in appointing a guardian under the facts presented.

In passing we note that the appointment of a special guardian was not intended to reflect adversely upon appellants' general standing and conduct as parents.

Affirmed, no costs.

APPENDIX B

State of New Jersey (Thomas J. Finn, Superintendent of B. S. Pollak Hospital for Chest Diseases, Complaining Witness),
Plaintiff-Respondent,
vs.
John A. Perricone and Ruth Perricone, Parents of John Perricone, an Infant,
Defendants-Appellants.

Appeal Docket No. 3794

Civil Action
On Appeal

Mandate on Affirmance

This cause having been duly argued before this Court by Mr. Hayden C. Covington of the New York Bar, counsel for the appellant and Mr. James H. Dowden, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Hudson County Juvenile and Domestic Relations Court is affirmed without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Hudson County Juvenile and Domestic Relations Court to be there proceeded with in

accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the fourth day of June, 1962.

FILED
Jun 4 1962
John H Gildea
Clerk

[Signed] John H. Gildea
Clerk of the Supreme Court